IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.813 OF 2000
IN
SESSIONS CASE NO.960 OF 1997

1. Joginder Rikai Paswan

2. Suraj @ Jijaji Frituram Saroj
at present residing at Shriram Nagar
Akurli Road, Vadarpada Road, Kandivali.

Both are at present lodged in
Yerwada Central Prison. Appellants/
Accused nos.1 & 2.

versus

1. The State of Maharashtra
at the instance of Kandivali (E)
Police Station). Respondent no.1.

2. Nizam Gafoor Patel,
Shivling Chawl, Shriram Nagar,
Cutting No.5, Kasndivali(E),
Bombay. Respondent no.2.

Mr. S.P.Kadam for the appellants.

Ms.V.R.Bhonsale, Addl. Public Prosecutor for the State.

CORAM : R. M. LODHA &
R. S. MOHITE,JJ.

DATED : 9th March 2005

ORAL JUDGMENT (Per R.M.Lodha,J.):

The legality and correctness of the judgment dated 24th/25th/27th July 2000 passed in Sessions Case No.960/1997 by the Additional Sessions Judge, Greater Mumbai is under challenge in this appeal. By the said judgment, the trial Court convicted the present

appellants of the offence punishable under Section 302 r/w Section 34 IPC for committing murder of Majnu Nizam Patel and sentenced them to suffer imprisonment for life.

2. Jogindar Rikai Paswan (A-1) and Majnu Nizam Patel (the deceased) were friends. Suraj @ Jijaji Frituram Saroj (A-2) is the brother in law of A-1. On 20th May 1997 at about 3 p.m. A-1 and Majnu Patel were playing cards in a truck. At that time the quarrel ensued between them wherein A-1 is said to have sustained injury. A-1 lodged a complaint in this connection at Kandivali (East) Police Station. The said complaint was registered in the N.C.Register at sr. no.2506/1997. At about 6-6.15 p.m. the policeman and A-1 went to the house of Majnu situated at Sriramnagar, Cutting no.5, Shivling chawl, Kandivali (East), Mumbai. Majnu was not available in the house. On 21st May 1997 at about 9-9.15 p.m. scuffle took place between Majnu on the one hand and A-1 and A-2 on the other hand near Samrat Ashok Library at Wadarpada. A-1 was armed with Koyata while A-2 was armed with iron rod. A-1 assaulted Majnu by koyata and A-2 assaulted him by iron rod. Kavita Laxman Etme (PW-3) who saw the occurrence of the incident immediately rushed to the house of Majnu which was close by and informed Nizam Gafoor Patel (PW-1) who was present in the house about the incident. PW-1 and his

daughter - Saida Nizam Patel (PW-2) accompanied by PW-3 rushed to the place of incident within two minutes. Majnu was lying there in injured and unconscious condition. Immediately one police vehicle reached the spot wherein Majnu was taken to Bhagawati hospital at Borivali. PW-3 left for her house. PW-1 accompanied his son in the police vehicle. Majnu was declared dead on admission to the hospital. Immediately thereafter PW-1 went to Kandivali (East) Police Station and lodged the First Information Report. The case under section 302 r/w section 34 IPC vide C.R.No.177/1997 was registered.

. Maruti Dhavaji Rathod (PW-11) the Police Inspector attached to Kandiavali (East) Police Station immediately called panch witnesses and prepared Inquest panchanama (Ex.13). The clothes on the person of the deceased (Article "1" collectively) were seized. PW-11 also went to the place of incident and prepared spot panchanama (Ex.16). He collected sample of earth mixed with blood and another sample of earth and pair of slipper. PW-11 came to know that the accused persons were at Kabrastan and, therefore, he along with police staff went there and arrested A-1 and A-2. The clothes on the person of both the accused were seized under arrest panchanama (Ex.19). A-1 volunteered to make disclosure statement about the concealment and production of koyata. PW-11

prepared memorandum (Ex.22) and then went along with the accused to the place suggested by him. In a room situated at Baba Kadam chawl, A-1 produced one koyata which was concealed in clothes bundle below kitchen ota. The koyata was found to have blood stains. PW-11 seized the koyata. PW-11 recorded statement of various witnesses. He also forwarded various articles viz., the clothes of the deceased, the clothes of the accused persons, the koyata, the earth mixed with blood and the other sample of the earth for chemical analysis.

. On 5th June 1997 A-2 volunteered to make disclosure statement. The memorandum (Ex.24) was prepared and an iron rod was recovered on the basis of the disclosure statement of A-2.

3. Going little backward into narration of facts, we notice here that immediately after the inquest panchanama was drawn, the dead body of Majnu was sent for post mortem to Rajawadi hospital. Dr.Kachare Shivaji Vishnu (PW-10) conducted post mortem of the dead body between 1 p.m. to 2 p.m. on 22nd May 1997 and found about 15 external injuries on the dead body. PW-10 also found internal injuries. According to him the cause of death was due to shock, haemorrhage and multiple injuries.

4. Upon conclusion of investigation, PW-11 submitted the chargesheet to the Court of Magistrate and the case was committed to the Court of Sessions.

5. On 6th December 1999, the Additional Sessions Judge, Greater Mumbai framed the following charge:

> " That you accused nos. 1 & 2 abovenamed on 21/5/97 at about 9.20 p.m. in open space in front of Samrat Ashok Vachanalaya, Shri Ramnagar, Cutting No.5 situated at Kandivali (E), Mumbai-101, in furtherance of your common intention did commit murder of Majnu Nizam Patel by assaulting him with weapons to wit Koyata and iron bar and thereby committed an offence punishable u/s.302 r/w. Sec. 34 of IPC and within my cognizance.
>
> . And I direct that you be tried by me on the aforesaid charges."

6. The prosecution examined 11 witnesses in all.

7. Nizam Gafoor Patel (PW-1) is the father of the deceased Majnu. He got the information of the incident from PW-3 and immediately rushed to the place of occurrence along with PW-3 and his daughter PW-2. He accompanied his son to Bhagwati hospital at Borivali in police vehicle. According to him his son was declared dead on his admission to the hospital. Immediately thereafter he lodged the First Information Report at Kandivali (East) Police Station. He deposed that his son at the time of incident was wearing one brown coloured half pant, one blue colour underwear and

brownish coloured printed half shirt (Article "1" colly.).

8. Sayeeda Nizam Patel (PW-2) is the younger sister of Majnu. She narrated the incident that occurred between A-1 and Majnu on 20th May 1997 (a day prior to the present incident). She also stated about the information given by PW-3 about the incident that occurred on 21st May 1997 at about 9 p.m. She also identified the clothes (Article "1" colly.) that her brother was wearing at the time of the incident.

9. Kavita Laxman Etme (PW-3) is the resident of the same locality. She is the eye-witness. She was knowing both the accused persons as well as the deceased. She testified that on 21st May 1997 at about 9.15 p.m. she went to Wadarpada to purchase Vadapav from the hand-cart usually parked near Samrat Ashok Library. While she was purchasing Vadapav she saw scuffle between the accused persons and the deceased. A-1 was armed with the weapon. She could not name the said weapon. A-2 was armed with iron rod. She saw A-1 and A-2 assaulting Majnu from their respective weapons. She immediately rushed to the house of Majnu and informed his father PW-1 about the incident and returned back to the spot of incident. The distance between the place of the incident and her house could be covered within 10-15

minutes by walk. She and PW-2 are friends. Her brother Sudhir was also friend of the deceased Majnu. She had also gone to meet A-1 before her evidence came to be recorded in the Court.

10. Bholaprasad Shivpujan Vishvakarma (PW-4) is the witness to inquest panchanama. He stated that at the time of inquest, one underwear, half pant and the shirt were on the person of the deceased. All these clothes were soaked with blood. These clothes were attached by the police in his presence.

11. Ashok Tukaram Kale (PW-5) is the witness to spot panchanama. The place of occurrence, according to him, was inspected by PW-11 on 21st May 1997 at about 11.45 p.m. The spot of incident as per PW-5 is opposite Samrat Ashok Library on the main road. There was blood on the spot. In his presence police collected earth mixed with blood and sample of pair of sleepers. At the time of inspection of the spot, he did not notice any handcarts.

12. Gurudas Ramdas Khainar (PW-6) is the witness to the arrest of A-1 and A-2. He deposed that in his presence, police seized one cream coloured long sleeves shirt and blue coloured full pant from A-1 and one blue coloured full shirt and brown coloured pant from the person of

A-2. He is witness to panchanama (Ex.19).

13. Savitribai Yeshwant Kasar (PW-7) is the resident of the same locality. As a matter of fact, her house is situated opposite Samrat Ashok Library. On 21st May 1997 at about 9.15 p.m. she was sitting on chair in front of her house. She heard the shouts "Bachao Bachao" and on hearing the shouts, she noticed that Majnu was being assaulted by the accused persons. A-1 was having koyata in his hand and A-2 was having iron rod. Both the accused assaulted Majnu above waist portion of his body.

14. Sunil Mahadeo Patil (PW-8) is the witness to the disclosure statement (Ex.22) based on which recovery of koyata was made.

15. Prakash Balu Bawadekar (PW-9) is the witness to the disclosure memorandum (Ex.24) prepared as per the statement of A-2 based on which recovery of iron rod was made on 05.06.1997.

16. Dr.Kachare Shivaji Vishnu (PW-10) at the relevant time was attached to Rajawadi hospital as Medical Officer. He performed post mortem of the dead body on 22.05.1997 between 1 p.m. to 2 p.m.

17. Maruti Dhavaji Rathod (PW-11) is the Investigating officer and in his deposition he gave the details of the investigation conducted by him.

18. Dr.Kachare (PW-10) while conducting post mortem of the dead body of Majnu noticed the following 15 external injuries:

1) Incised wound at left temporo pariental area longitudinal region admeasuring 5 cms x 2 cms x bone deep. (this injury was on left side of skull).

2) Incised wound at left side of neck postariarly admeasuring 5 cams x 0.5 cms x muscle deep.

3) Incised wound at midportion of skull horizontal admeasuring 7 cams x 2 cms x bone deep.

4) Deep cut lacerated wound at antirire of neck region and lower portion of mandible C shape admeasuring 6 cm x 5 cms x 5 cms. evalsion of muscles.

5) Incised wound below injury no.4, C shaped admeasuring 5 cms x 1 cms x 1 cms.

6) Incised wound at Posterior of left upper leg below buttock admeasuring 3.1/2 cms. x 1/2 cms. x 1 cms.

7) Abrasin over anterior of neck below lower portion of neck admeasuring 6.1/2 cms. x 0.5 CMs.

8) Contusion over posterior of back at superior of left scapula admeasuring 2 cms x 1 cms.

9) Contusion over posterior of left upper arm admeasuring 8 cms x 2 cms.

10) Abrasion over left lateral of left upper arms admeasuring 6 cms x 2 cms.

11) Incised wound at base of left thumb admeasuring 5 cms x 2 cms x Muscle cut.

12) Incised wound at wrist joint posteriorly admeasuring 3.1/2 cms x 1 cms x 1 cms.

13) Incised wound anterior of left cuboital ablique admeasuring 8 cms x 2 cms x 1 cm.

14) Incised wound at anterior of right lower arm admeasuring 5 cms x 2 cms x 2 cms oblique.

15) Incised wound at right palm admeasuring 3 cms x 1 cms x 1 cms.

19. All the aforesaid injuries were found ante mortem by PW-10. He also found that right forefinger was amputated at terminal phalangeal joints. He also found two internal injuries viz. (i) subcutaneous haemorrahages was found and the scalp muscles were ruptured over left side of skull corresponding to external injury nos. 1 and 2 and (ii) fracture at left temporo-pariental bone admeasuring 5 cms x 1 cms. congitudinale in directions corresponding to external injury nos. 1 and 3. In the opinion of PW-10 the aforesaid injuries were possible by moderately heavy sharp edged weapon and possible by Article-2 (koyata) and Article-3 (iron bar). Majnu died due to shock of haemorrhage and multiple injuries as per the evidence of PW-10.

20. Having reflected over his evidence, we find that prosecution has been able to establish that the death of

Majnu was homicidal.

21. There is direct evidence in the present case. That evidence is that of Kavita Laxman Etme (PW-3) and Savitribai Yeshwant Kasar (PW-7).

22. We shall deal with the evidence of PW-7 first. Broad features of her evidence have already been noticed above. Her house is opposite Samrat Ashok Library. The incident took place just opposite her house in the night of 21st May 1997 at about 9.15 p.m. At the time of incident she was sitting in front of her house and on hearing the shouts "Bachao Bachao" she noticed that A-1 and A-2 were assaulting Majnu. Her evidence is criticised by the learned counsel for the appellants mainly on two counts (one) that there was omission that the accused assaulted Majnu on his chest and (two) that her deposition that the injured was wearing the underwear was inconsistent and contradictory to the other evidence of the prosecution. As regards the omission, suffice it to say, that it is too minor and cannot be treated as a contradiction discrediting the testimony of this witness. She deposed that the accused assaulted Majnu above waist portion, on his neck and chest. It is true that in her statement before the police she did not state that the accused assaulted Majnu on his chest, however, we find such omission is

very minor. As regards her deposition that the injured was wearing underwear, we may observe that the deceased admittedly was in short at the time of incident and if she described short as underwear, that would not create any doubt about her presence. As a matter of fact, PW-7 is the most natural witness. She has identified both the accused persons beyond doubt. She clarified that Jogindar and Jogya is the same person. She also identified the weapons viz., Koyata and iron rod. Her evidence is corroborated by the medical evidence. In our view, this witness remains unshaken and we find her worthy of court's faith.

23. PW-3 is the other eye-witness. The learned counsel for the appellants, however, submitted that there was no occasion for her to be present at the place of the incident. It was submitted that PW-3 is the interested witness. She is friend of PW-2. Her brother was also friend of the deceased. The learned counsel pointed out certain omissions in her statement. He also submitted that in her statement, PW-3 deposed that she did not know the name of brother in law of A-1. The learned counsel would submit that in her deposition PW-3 has not stated anywhere that brother in law to whom she has referred as assailant is the brother in law who is accused in the present case. The learned counsel also invited our attention to the fact that PW-3 had visited

A-1 in Arthur Road Jail. The learned counsel, thus, submitted that PW-3 is not reliable witness and her evidence should be rejected.

24. That PW-3 was knowing the deceased as well as the accused does not seem to be in doubt. Afterall she was residing in the same locality where the deceased was residing and the accused A-1 used to reside earlier. The fact that she was present at the time the incident took place is fortified by the fact that immediately on seeing the incident she rushed to the house of the victim, informed about the incident to PW-1 who was present in the house and came back to the place of the incident immediately thereafter accompanied by PW-1 and PW-2. These facts are eloquent enough to establish that she witnessed the incident. Her deposition that A-1 was armed with weapon used for cutting fish and that he gave blows on Majnu with that weapon, gets support from the injuries sustained by the deceased. Out of the 15 external injuries, there are 11 injuries which could be caused by the weapon held by A-1. She also categorically deposed that A-2 was armed with iron rod and he assaulted the deceased. This evidence also gets corroboration from the medical evidence asmuch as some of the injuries sustained by Majnu were caused by weapon like iron rod. In her deposition in the beginning she deposed that she knew A-1 and A-2 and both of them were

present in the Court but little later she did say that she did not know the name of A-1's brother in law. The fact that before her evidence came to be recorded, she visited A-1 at Arthur Road Jail suggests that she might have thought of helping the accused persons by deposing that she did not know the name of the brother in law of A-1. In our view, this part of the deposition where she stated that she did not know the name of brother in law of A-1, needs to be ignored in the light of her categorical testimony that she knew both the accused persons who were present in the Court as accused. Merely because she happened to be friend of PW-2 (deceased's sister) or that her brother Sudhir happened to be friend of deceased Majnu, the evidence of PW-3 does not become evidence of an interested person. Few omissions here and there pointed out by the learned counsel are too minor and insignificant to discredit this witness. We find that the material facts pertaining to the incident deposed by PW-7 and PW-3 do not suffer from any inconsistency. We have no hesitation in holding that PW-3 and PW-7 witnessed the incident and their evidence deserve acceptance by the Court.

25. Besides the ocular evidence that we have already referred above, there is other incriminating evidence on

record that connects the accused persons with the crime.

26. The forensic evidence proves that the blood group of the deceased was "O". The blood group of A-1 is "O" and that of A-2 is "A". At the time of arrest A-1 did not have any injury on his person. However, the clothes seized from his person at the time of his arrest were blood stained. The full open shirt that the A-1 was wearing at the time of his arrest and seized from him was sent for Chemical Analysis and was found to have group "O". There is no explanation from A-1 in this regard. As regards A-2, at the time of his arrest he was wearing full open shirt and the full pant. Both these articles were seized and found to have blood stains. C.A.report indicates that the said clothes of A-2 had blood stains of group "O". There is no explanation whatsoever by A-2 in this regard.

27. Then there is recovery of koyata from A-1 and iron rod from A-2. The koyata recovered at the instance of A-1 was found to have blood stains and the C.A. report shows that there was human blood on the koyata. The iron rod recovered at the instance of A-2 was not sent for chemical analysis and rightly so because no blood was found on the said rod.

28. The evidence on record, thus, clearly implicates

the accused persons for the death of Majnu. The charge against the accused persons for the offence punishable under Section 302 read with Section 34 of Indian Penal Code is established beyond reasonable doubt.

29. The appeal, accordingly, fails and is dismissed.

(R.M. LODHA,J.)

(R.S. MOHITE,J.)